PUBLIC PROSECUTOR

v.

KAU JOO HUAT

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN SCJ
WAN HAMZAH SCJ
[CRIMINAL REFERENCE NO. 7 OF 1987]
13 FEBRUARY 1988

CRIMINAL LAW AND PROCEDURE: *Question of law of public interest - Section 66(1) Courts of Judicature Act 1964 - Possession - Dangerous Drugs Act 1952 - Whether possession would require proof of power of disposal of drug by Accused.*

This was a reference under s. 66(1) of the Courts of Judicature Act 1964 which reserved the following question for the decision of the Supreme Court:

> Whether possession for the purpose of the Dangerous Drugs Act 1952 would require proof of the power of disposal of the drug by the accused?

Held:

[1] Although on the particular facts of the case, the learned Judge was right to allow the (respondent's) appeal, he was wrong to say that the Accused must have the power of disposal to support the conviction.

[2] The question was answered in the negative.

[Question answered in negative]

Cases referred to:
Toh Ah Loh and Mak Thim v. Rex [1949] 15 MLJ 54
Chan Pean Leon v. PP [1956] MLJ 237
PP v. Ang Boon Foo [1981] 1 MLJ 40
Leow Nghee Lim v. Reg [1956] 22 MLJ 28
R. v. Smith [1835] 6 Cox 554

Legislation referred to:
Courts of Judicature Act 1964, s. 66(1)
Dangerous Drugs Act 1952, s. 37(d)

For the applicant - Mohd. Noor bin Hj. Ahmad, DPP
For the respondent - Phang Ah Hee; M/s. Phang & Co.

JUDGMENT

Lee Hun Hoe CJ (Borneo):

This reference under s. 66(1) of the Courts of Judicature Act, 1964 reserves the following question for the decision of this Court:

> Whether possession for the purpose of the Dangerous Drugs Act, 1952 would require proof of the power of disposal of the drug by the accused?

It is necessary to set out the facts. On 2 August 1981, acting on information, a police party led by a police inspector raided a room in Sentosa Hotel. They found the respondent and two travelling bags - one green and the other red. They searched the bags. Nothing

incriminating was found in the green bag. However, in the red bag they found two pairs of trousers one of which was black in colour and a black box. Inside the black box was one plastic packet containing certain substance which one analysis by the Government Chemist was found to be opium. He was arrested and taken to the police station. In a follow-up operation on 4 August 1981 Hassan bin Ismail was arrested when he came knocking at the door of the room. The respondent's story is that he shared the room with his Malay friend Hassan and that the red bag belonged to Hassan. They planned to go to Sabah but was informed by the travel agent that their flight would be on 4 August 1981 instead of 31 July 1981. Hassan decided to return to his home in Sekinchan leaving his red bag behind. The room was registered in the respondent's name. The respondent decided to stay on in the hotel.

The learned Judge pointed out that the learned President found that the black pair of trousers in the red bag was the type usually worn by exponents of the Malay art of self-defence. This finding, the learned Judge thought, was consistent with the evidence of the investigating officer who said the pair of black trousers was like a bersilat trousers. The learned Judge considered that the learned President had made the right finding of facts but that he was wrong to say, in view of his finding that the red bag belonged to Hassan, that the presumption under s. 37(d) of the said Act had not been rebutted.

In dealing with the word "possession" the learned Judge referred to the oft cited case of *Toh Ah Loh and Mak Thim v. Rex* [1949] 15 MLJ 54. Where Gordon-Smith Ag. CJ stated:

> ... Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power disposal over the thing, and lastly must be conscious of his possession of the thing ...

He also cited *Chan Pean Leon v. PP* [1956] MLJ 237 and *PP v. Ang Boon Foo* [1981] 1 MLJ 40 in support. He was of the view that the red bag and its content were owned by Hassan and that the appellant had no power of disposal of the red bag or its content as it did not belong to him. Consequently, he held that the presumption under s. 37(d) had been rebutted. It seems clear Hassan did not know of the respondent's arrest otherwise he would not have returned to the room.

The application contended that *Toh Ah Loh and Mak Thim v. Rex* (*supra*) concerned with a charge of unlawful possession of ammunition under the Firearms and Ammunition (Unlawful Possession) Ordinance, 1946. It does not apply to cases involving dangerous drugs. One has to look at the particular statute. In support he referred to *Leow Nghee Lim v. Reg* [1956] 22 MLJ 28 @ 30. Where Taylor J said at p. 30:

> A number of cases were cited and I have since consulted some others. I do not propose to go through them. It is clear that they conflict and it is therefore necessary to go back to first principles. I must, however, comment on the misuse which has been made of the dictim in *Mak Thim* (*supra*). There are Court Specified certain characteristics without which, they said, (except by statute) possession cannot be criminal. The words in brackets are vital. They were deliberately inserted to show that the ruling is not applicable where the meaning of the word "possession" is controlled by the particular statute ...

So much has been said about s. 37(d) of the Dangerous Drugs Act it would be better to set it out in full. It reads:

> 37. In all proceedings under this Act or any regulation made thereunder:
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> ...
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> ...

(a) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

It is submission of the applicant that the power of disposal is not an essential ingredient in a dangerous drug case.

Although on the particular facts of the case we consider the learned Judge right to allow the appeal, we are of the view that he was wrong to say that the accused must have the power of disposal to support the conviction. For instance, a person stole dangerous drug knowing the thing he was stealing was dangerous drug, legally he would have no power to dispose of it. If he was arrested by the police while in possession of the stolen dangerous drug he could successfully be charged under the Dangerous Drugs Act with possession of it and he would even be convicted of trafficking if the amount of the drug in his possession was sufficient for the charge of trafficking, although he had no power to dispose of it.

The accused said that he did not know there was drug in the red bag. It was not in dispute that although the room was registered in his name he shared it with his Malay friend. Both the lower Courts took the view that the red bag in fact belonged to his Malay friend. However, in his grounds of decision the learned President dealt with the non-knowledge briefly and stated:

> Beyond the point that he did not own the bag; the accused's claim that the bag was given to him the contents of which he was completely unaware of remains a bare assertion of one of many possibilities.

In fact, it was not a mere bare assertion that the learned President had to consider. Certain factors tend to support the accused's assertion. First, before the accused opened the door of his room the police knocked on the door and made known that they were police. If the accused had known of the presence of the drug in the bag he would have thrown the bag out of the window. Secondly, the evidence of the presence of the Malay dress in the bag tends to show that the bag belonged to his Malay friend, and this in turn tends to support his assertion that he did not know the contents of the bag since the bag did not belong to him.

It is a matter of grave doubt whether on the totality of the evidence the prosecution has established that the accused had custody and control of the drug found in the bag. The benefit of the doubt should have been decided in favour of the accused. In his grounds of decision the learned President did not give sufficient consideration, or gave no consideration at all, to the factors mentioned earlier, but merely brushed aside the defence of non-knowledge. In our view the failure on the part of the learned President and occasioned injustice. The learned Judge was right to quash the conviction and the sentence.

More than one hundred and thirty years ago, in the case of *R. v. Smith* [1835] 6 Cox 554. Chief Justice Erle referred to possession as that "vaguest of all vague questions." That difficulty still persists is clearly shown in the number of cases cited in this reference. For reasons given we would answer the question in the negative.

Also found at [1988] 1 CLJ 477